SUPREME COURT, U. S.
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MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM, 1973

CASE NO. 73-500

RAYMOND L. NEWTON, and
GERMAINE C. NEWTON,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

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MIAMI REVIEW — 371-4853 — 377-3721

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INTRODUCTION

The petitioners here were the defendants in the criminal court and the appellants in the Third District Court of Appeal of Florida. The symbol "Tr." will be used to refer to the transcript of record, and "App." will designate

the Appendix attached. All emphasis is supplied unless otherwise indicated.

The opinion sought to be reviewed is appended hereto (App. 1-8), and reported at 272 So.2d 15.

GROUNDS FOR JURISDICTION

The decision of the Third District Court of Appeal of Florida, which affirmed the petitioners' convictions of second degree murder was filed on January 3, 1973 (App. 1), and rehearing was denied on February 5, 1973 (App. 9). The Supreme Court of Florida refused to review the opinion of the intermediate appellate court by a memorandum order denying certiorari dated May 16, 1973, and an order denying rehearing entered on June 19, 1973 (App. 10-12). These are reported at 278 So.2d 627.

This Court has jurisdiction to review the challenged opinion of affirmance pursuant to 28 U.S.C. §1257.

QUESTION PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT'S REFUSAL TO PERMIT PETITIONERS' COUNSEL TO IMPEACH THE FORMER TESTIMONY OF A PROSECUTION EYEWITNESS WITH HIS SUBSEQUENT CONTRADICTORY AFFIDAVIT, AND ITS REFUSAL TO PERMIT COUNSEL TO CROSS EXAMINE OTHER EYEWITNESSES AS TO THEIR REASON FOR HAVING CHANGED THEIR TESTIMONY BETWEEN THE FIRST TRIAL AND THE SECOND DEPRIVED PETITIONERS OF THE FAIR TRIAL TO WHICH THEY WERE ENTITLED

CONSTITUTIONAL PROVISION INVOLVED

The petitioners were denied the due process of law guaranteed them by Section 1 of the Fourteenth Amendment to the United States Constitution, i.e.:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The statement of the case may be gleaned, in part, from the opinion sought to be reviewed. To facilitate legibility, those portions will be quoted but not single-spaced:

"These consolidated appeals by Raymond L. Newton (appeal no. 71-1142) and Germaine C. Newton (appeal No. 71-1143), are from their conviction of second degree murder, when tried under an indictment charging them with murder in the first degree. Raymond Newton received a life sentence. Germaine Newton was sentenced to imprisonment for twenty years. * * * "

"Facts the jury was entitled to find from the evidence included the following. The defendant was the owner or operator of a business designated 'Ray's Car Lot.' A half-brother of the victim William Flagler was having some work done on his car there. On Saturday afternoon,

January 10, 1970, the victim and several other persons including his half-brother drove onto the lot. The half-brother got out of the car and remained there. The victim drove away in a manner which resulted in the wheels of his car throwing stones or pebbles which may have struck some of the cars on the lot. Thereupon, in the presence of witnesses who so testified at trial, the appellant Ray Newton told the victim's half-brother, 'Jack, be sure when you get home to tell your brother when I see him I am going to stomp his damned - - - in the ground.' Approximately a half hour after midnight of that day the defendants Ray Newton and his wife Germaine Newton came into the victim's house. Both were armed with shotguns. Present, in addition to the victim and his wife, were a number of their friends. After brandishing his weapon Ray Newton proceeded from the room in which the friends were present into an adjoining room which was a bedroom, and his wife stood in the doorway to that room. On entering the bedroom the defendant Ray Newton shouted: 'Where's William? Where's William?' The victim's wife, who was in or went into the bedroom at that time, answered that he (William Flagler) was not there. On a bed in the room a form (which in fact was William Flagler) lay huddled under the bed clothes. Ray Newton approached the bed with the shotgun and 'pushed twice' against the figure under the covers and the gun was discharged into the figure on the bed. The shot proved fatal to the victim. A witness testified that after the gun went off the defendant Germaine Newton stated: 'That boy is not dead. He got guts,' and then said: 'Let's go, Ray.' Thereupon the Newtons departed.

"Appellants' first two contentions challenge rulings of the trial court involving testimony of a witness, Robert

Lee Green. The trial was the second trial of the defendants under the indictment. On the first trial, which ended in a mistrial, Green had testified as a witness for the state. When the second trial was held Green was in Viet Nam. The state presented the testimony given by Green at the prior trial, as authorized by Rule 3.640(b) CrPR, 33 F.S.A.

"Defendants sought to impeach that testimony by offering in evidence an affidavit containing contradictions of Green's earlier testimony, which affidavit had been made by Green after the first trial and prior to leaving the country."

In that testimony Green swore, inter alia, (1) that defendant Ray Newton broke into the decedent's house just before the homicide (Tr. 399), (2) that Newton then pushed Green into the bedroom (Tr. 400), and (3) that Newton pulled the trigger of his shotgun and thereby caused the fatal discharge of the weapon (Tr. 429-430). Green further testified that defendant Germaine Newton was pointing her gun at the occupants of the house during the foregoing events (Tr. 402).

In his later sworn statement, Green deposed (1) that defendant Ray Newton had not broken into the house (Tr. 808, 818), (2) that he had not been pushed into the bedroom (Tr. 809), and (3) that Ray Newton's hand was not on the trigger of the shotgun, but that the weapon discharged accidentally (Tr. 813-814, 816-817). Green also contradicted his testimony about Germaine Newton when he later swore that she had not pointed her gun at anyone (Tr. 817-818), but held it at "port arms" (Tr. 812).

The State agreed at the trial that the affidavit, supra, was authentic (Tr. 333), but the trial court refused to

permit it into evidence (Tr. 372-377). It appears in the record as Court's Exhibit #1 for Identification (Tr. 805-820).

"Appellants' third contention was stated in the brief as follows: 'Whether the trial court erred in not permitting defense counsel to cross-examine designated prosecution witnesses as to their reason for having changed their testimony between the first trial and the second.'

"One of the eye witnesses to the shooting, L. T. Bowen, who was made a court witness at the second trial, testified that in holding the gun Ray Newton did not have his finger on the trigger of the shotgun but had his hand on the stock some inches to the rear of the trigger. The state, in its examination of the witness brought out that at the first trial Bowen had testified Ray Newton had his finger on the trigger. The appellants argue the court erred by sustaining objections by the state to questions by defendants' counsel to witnesses Leroy Green and L. T. Bowen as to a motive for such different testimony at the two trials. As a proffer defendants' counsel stated that, if permitted to answer, those witnesses would testify that at the time of the first trial the eye witnesses to the occurrence had agreed to make their testimony against the defendant Ray Newton 'as hard on the defendant as possible to show deliberate murder so that the sister, Geraldine Bowen, could obtain money in a lawsuit which was anticipated and pending and not dispensed with.' "

The petitioners here contended in their main brief filed before the Florida appellate court that "(t)he trial court's exclusionary ruling on the attempted cross-examination effectively destroyed (their) constitutional right to confrontation of the witnesses testifying against them."

ARGUMENT

Chambers v. Mississippi, 93 S.Ct. 1038, was decided by this Court on February 21, 1973. It held that the failure to allow cross-examination of a witness to impeach his testimony was a denial of the due process provisions of the Fourteenth Amendment to the United States Constitution (Id., p. 1045):

> "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499,507, 92 L.Ed. 682 (1948), identified these rights as among the minimum essentials of a fair trial:
>
> > 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' "
>
> * * *
>
> "Chambers was denied an opportunity to subject McDonald's damning repudiation and alibi to cross-examination. He was not allowed to test the witness' recollection, to probe into the details of

his alibi, or to 'sift' his conscience so that the jury might judge for itself whether McDonald's testimony was worthy of belief. Mattox v. United States, 156 U.S. 237, 242-243, 15 S.Ct. 337, 339-340, 39 L.Ed. 409 (1895). *The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.'* Dutton v. Evans, 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970); Bruton v. United States, 391 U.S. 123, 135-137, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' Pointer v. Texas, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. *E.g.*, Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972). But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined. Berger v. California, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969)."

Although **Chambers**, supra, is a very recent case, the fundamental importance of the right to impeach a hostile witness is well-established. See **Campbell v. United States**, 373 U.S. 487, 496, 83 S.Ct. 1356, 1362; **Heard v. United States**, 8th Cir. 1919, 255 F. 829, 832.

The State court below, in affirming the trial court's rejection of eyewitness Green's impeaching affidavit, relied primarily upon **Mattox v. United States,** 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (App. 3-4). However, that case involved a situation where the witness who had given the prior testimony was dead, and the defendant sought to show by third parties that the deceased had made statements contrary to his testimony at the prior trial. **Mattox** was not concerned with a sworn testimony **by the witness himself** that he had lied at the first trial, as this case is, supra, p. 5.

Robert Lee Green's former testimony was admitted, if properly at all, as an exception to the rule against hearsay. **Blackwell v. State,** 79 Fla. 709, 728, 86 So. 224, 230 (1920); **Richardson v. State,** Fla.1971, 247 So.2d 296, 300. **Jones on Evidence,** 5th ed., Volume 4, §936, p. 1764, comments:

> "Where the statement to be impeached is a hearsay statement admitted under an exception to the hearsay rule, evidence of contradictory statements may be offered and the rule requiring presentation of the contradictory writing to the declarant has no application. This is particularly true where the declarant, because of death or absence from the jurisdiction, is not available to be called as a witness.

The reason for the rule permitting impeachment of former testimony is perhaps best set forth in a venerable Massachusetts case, **Tucker v. Welsh,** 17 Mass. 160, 167 (1821), viz.:

> "* * * Suppose a witness who has once testified should afterwards acknowledge the falsity of his statements, and then die; the party interested in his testimony might upon another trial prove what he had once said upon the stand under oath; and shall not the other party be permitted to prove that what he said was a falsehood?"

The State court here ignored the inescapable logic of the quoted holding and permitted the State to have its cake (adduce the former testimony of Green), and eat it too (by rejecting Green's contradictory affidavit). The holding in **People v. Collup,** 27 Cal.2d 829, 167 P.2d 714, 717-718 (1946), is compelling:

> "In the instant case the prosecution was enabled to read the transcript of Nelson's testimony given at the preliminary hearing on the basis of a showing (the sufficiency of which we do not decide) that the witness was out of the state. Pen.Code, §686; Code Civ.Proc. §1870(8). The witness was not therefore available to either the prosecution or defendants. The impeaching evidence consisted of statements made by the witness after she had testified at the preliminary hearing and hence could not have been used at the preliminary hearing. The defendants are helpless in meeting the testimony by a method which may refute it entirely or cast serious doubts upon its

> veracity, namely, subsequent contradictory statements or admissions by the witness that the testimony was false. **Justice and fairness compel one of two results, that the testimony at the former trial be excluded or that the impeaching evidence be admitted.** * * *"

In rejecting the instant petitioners' asserted right to adduce testimony indicating **why** two of the eyewitnesses changed their stories between the first trial and the second, the opinion sought to be reviewed observed, in part, that the error was harmless because their testimony at the second trial was less damaging than their earlier version (App. 5-6). The State appellate court thereby overlooked the maxim "Falso In Uno, Falso In Omnibus." The jury might have seen fit to discredit **all** of the testimony by **all** of the eyewitnesses if it had been permitted to learn that they had conspired to, and did, swear falsely at the first trial for pecuniary reasons, supra. p. 6.

> "It is competent to show the motives of a witness to impeach him. Motive may include either the purpose of gratifying the witness' prejudice, bias, hostility, or friendship towards a party, or the purpose of serving his own interest, and may be shown by the proof of specific wrongful acts.
>
> "Corrupt testimonial intent of the witness may always be shown. Hence, it may be proved that there is an existing motive on the part of a witness to give testimony against a party regardless of its truth." * * *
>
> **3 Wharton's Criminal Evidence,** 12th ed., Section 906.

CONCLUSION

That a writ of certiorari should issue to review the subject decision of the Third District Court of Appeal of Florida is, therefore,

Respectfully submitted,

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APPENDIX

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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1972

CASE NO. 71-1142
71-1143

RAYMOND L. NEWTON, and
GERMAINE C. NEWTON,

Appellants,

vs.

THE STATE OF FLORIDA,

Appellee.

Opinion filed January 3, 1973.

Appeals from the Circuit Court for Dade County, Francis J. Christie, Judge.

Carr & Emory, for appellants.

Robert L. Shevin, Attorney General and Linda C. Hertz, Legal Intern, for appellee.

Before BARKDULL, C.J., and CHARLES CARROLL and HAVERFIELD, JJ.

PER CURIAM.

These consolidated appeals by Raymond L. Newton (appeal No. 71-1142) and Germaine C. Newton (appeal No. 71-1143), are from their conviction of second degree murder, when tried under an indictment charging them with murder in the first degree. Raymond Newton received a life sentence. Germaine Newton was sentenced to imprisonment for twenty years. On consideration of the several contentions presented on behalf of the appellants as grounds for reversal, we find no reversible error has been shown.

Facts the jury was entitled to find from the evidence included the following. The defendant was the owner or operator of a business designated "Ray's Car Lot." A half-brother of the victim William Flagler was having some work done on his car there. On Saturday afternoon, January 10, 1970, the victim and several other persons including his half-brother drove onto the lot. The half-brother got out of the car and remained there. The victim drove away in a manner which resulted in the wheels of his car throwing stones or pebbles which may have struck some of the cars on the lot. Thereupon, in the presence of witnesses who so testified at trial, the appellant Ray Newton told the victim's half-brother, "Jack, be sure when you get home to tell your brother when I see him I am going to stomp his damned - - - in the ground. Approximately a half hour after midnight of that day the defendants Ray Newton and his wife Germaine Newton came into the victim's house. Both were armed with shotguns. Present, in addition to the victim and his wife, were a number of their friends. After brandishing his weapon Ray Newton proceeded from the room in which the friends were present into an adjoining room which was a bedroom, and his wife stood in the doorway to that room. On entering the bedroom the defendant Ray Newton shouted: "Where's William?

Where's William?" The victim's wife, who was in or went into the bedroom at that time, answered that he (William Flagler) was not there. On a bed in the room a form (which in fact was William Flagler) lay huddled under the bed clothes. Ray Newton approached the bed with the shotgun and "pushed twice" against the figure under the covers and the gun was discharged into the figure on the bed. The shot proved fatal to the victim. A witness testified that after the gun went off the defendant Germaine Newton stated: "That boy is not dead. He got guts," and then said: "Let's go, Ray." Thereupon the Newtons departed.

Appellants' first two contentions challenge rulings of the trial court involving testimony of a witness, Robert Lee Green. The trial was the second trial of the defendants under the indictment. On the first trial, which ended in a mistrial, Green had testified as a witness for the state. When the second trial was held Green was in Viet Nam. The state presented the testimony given by Green at the prior trial, as authorized by Rule 3.640(b) CrPR, 33 F.S.A.

Defendants sought to impeach that testimony by offering in evidence an affidavit containing contradictions of Green's earlier testimony, which affidavit had been made by Green after the first trial and prior to leaving the country.

We agree with the ruling of the trial court in excluding the affidavit, on the authority and reasoning of Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409. See also Young v. United States, 5 Cir. 1938, 97 F.2d 200, 206; Culwell v. United States, 5 Cir. 1952, 194 F.2d 808, 811.

In Mattox v. United States, supra, it was held that where a witness in a criminal trial had died since the trial and his testimony given on the first trial was read in evidence at a second trial, statements made by him after the first trial, that his testimony on that trial was false, are not admissible to impeach his earlier testimony. Commenting thereon the Court said:

> "While the enforcement of the rule, in case of the death of the witness subsequent to his examination, may work an occasional hardship by depriving the party of the opportunity of proving the contradictory statements, a relaxation of the rule in such cases would offer a temptation to perjury, and the fabrication of testimony, which, in criminal cases especially, would be almost irresistible. If it were generally understood that the death of a witness opened the door to the opposite party to prove that he had made statements conflicting with his testimony, the history of criminal trials leads one to believe that witnesses would be forthcoming with painful frequency to make the desired proof. The fact that one party has lost the power of contradicting his adversary's witness is really no greater hardship to him than the fact that his adversary has lost the opportunity of recalling his witness and explaining his testimony would be to him. There is quite as much danger of doing injustice to one party by admitting such testimony as to the other by excluding it. The respective advantages and disadvantages of a relaxation of the rule are so problematical that courts have, with great uniformity, refused to recognize the exception."

In the instant case the reason for application of the rule of exclusion of such evidence is even stronger than in the Mattox case where the witness had died, because when Green's affidavit was obtained by defendants after the first trial they could have taken steps to preserve his testimony before he departed the country, for the purpose of its use in the second trial, under the procedure provided therefor by Rule 3.190(l) CrPR. They did not do so, and it appears that the state was not aware of the making of such affidavit by the witness Green, and did not have knowledge of Green's whereabouts at that time.

Appellants' third contention was stated in the brief as follows: " Whether the trial court erred in not permitting defense counsel to cross-examine designated prosecution witnesses as to their reason for having changed their testimony between the first trial and the second."

One of the eye witnesses to the shooting, L. T. Bowen, who was made a court witness at the second trial, testified that in holding the gun Ray Newton did not have his finger on the trigger of the shotgun but had his hand on the stock some inches to the rear of the trigger. The state, in its examination of the witness brought out that at the first trial Bowen had testified Ray Newton had his finger on the trigger. The appellants argue the court erred by sustaining objections by the state to questions by defendants' counsel to witnesses Leroy Green and L. T. Bowen as to a motive for such different testimony at the two trials. As a proffer defendants' counsel stated that, if permitted to answer, those witnesses would testify that at the time of the first trial the eye witnesses to the occurrence had agreed to make their testimony against the defendant Ray Newton "as hard on the defendant as possible to show deliberate

murder so that the sister, Geraldine Bowen, could obtain money in a law suit which was anticipated and pending and not dispensed with."

That point or contention of error presented by appellants is held to be without merit. It should be noted, as to the difference pointed out in the testimony at the two trials, that what was said on the second trial as to whether Newton's finger was on the trigger, was more favorable, or less damaging to the defendant than was the testimony on that feature at the earlier trial. Since the purpose of the cross-examination which the court excluded in this case, as revealed by the proffer, was to attempt to show that the eye witnesses had agreed to exaggerate their testimony on that point in order "to show deliberate murder," that is, to show premeditation, then if in fact they had agreed to so testify incorrectly on the first trial, it would be immaterial. This is so because on the first trial, where such exaggerated testimony is supposed to have occurred, a mistrial resulted, and that "finger on the trigger" testimony was not repeated at the second trial.

Moreover, if the ruling should be considered to be contrary to a general rule permitting inquiry as to motive for divergent testimony of a witness on separate occasions, for the purpose of disclosing interest or bias of the witness, it would be harmless error in this case, for several reasons; first, because the bias indicated by the proffer was at the first trial rather than on the subsequent trial; second, because on the second trial the jury rejected the element of premeditation, for proof of which that particular testimony had bearing; and third, because evidence to establish and support the conviction of the defendants of second degree murder was ample if not overwhelming. §924.33

Fla.Stat., F.S.A. Cornelous v. State, Fla.1950, 49 So.2d 332, 335; Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705; Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284.

Appellants argue that the judgments should be reversed because of a certain comment by the state attorney in closing argument. Appellants insist it was a comment prohibited by Rule 3.250 CrPR, on the failure of the defendant Raymond Newton to testify in his own behalf. The defendant Germaine Newton testified at the trial. The comment in question was; "Now, no one else testified in this cause that they invited either Mr. or Mrs. Newton into the house. And we asked them each and every one of them." That comment, when taken in context, was not within the prohibition of Rule 3.250.

The statement had relation to a question raised in the trial as to whether the Newtons' entrance into the house was invited or uninvited. It appears that the persons (other than the victim) who were occupants of the house at the time of the incident had testified on the point. Most stated they were asleep or dozing when the defendants came in. The victim's wife stated she had ben asleep and was awakened by the sound of a car driving up to the house. The testimony of the occupants was that he or she had not invited the Newtons in, and had not heard anyone else invite them to come in. One of the occupants who was awake at the time, Robert Lee Green, testified he was in the kitchen when the defendant Raymond Newton "busted in the back door."

The challenged statement of the state attorney followed a reference by him to the testimony of Green, that

"they busted in the door" and that "then Ray stuck a gun in my side." Therefore, the state attorney's statement was another way of saying that Green had said the defendants came in uninvited ("busted in the door") and that none of the other witnesses testified "they invited Mr. or Mrs. Newton into the house. And we asked them, each and every one of them." Quite obviously, the challenged statement of the state attorney had reference only to the answers given on the question as to "invitation" *by the witnesses who testified.* It had no reference to anyone who had not been a witness. As we view the statement it could not reasonably have been construed by the jury to have referred to other than the witnesses who had testified on that point. The trial court was eminently correct in holding the challenged statement did not constitute basis or necessity for the granting of a mistrial.

A final contention presented by the appellants is that the court erred in denying their motion to suppress evidence consisting of two shotgun shells and a loaded 38 calibre revolver found by the police upon search of the automobile of the appellant Germaine Newton, on a search warrant obtained after her arrest. We find no error there. Ludwig v. State, Fla.App.1968, 215 So.2d 898; State v. Gustafson, Fla.1972, 258 So.2d 1.

The judgments are affirmed.

[TITLE OMITTED]

MONDAY, FEBRUARY 5, 1973

Counsel for appellants having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

S/

Clerk District Court of
Appeal, Third District

App. 10

SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1973

WEDNESDAY, MAY 16, 1973

CASE NO. 43,411

RAYMOND L. NEWTON and
GERMAINE C. NEWTON,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

DISTRICT COURT OF APPEAL
THIRD DISTRICT

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdic-

tion, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ERVIN, Acting Chief Justice, ADKINS, BOYD, McCAIN and DEKLE, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

(SEAL)

By: S/
Chief Deputy Clerk

App. 12

[TITLE OMITTED]

TUESDAY, JUNE 19, 1973

On consideration of the petition for rehearing filed by attorneys for petitioners,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

ERVIN, Acting Chief Justice, ADKINS, BOYD, McCAIN and DEKLE, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

(SEAL)

By: S/
Chief Deputy Clerk

...ARY
SUPREME COURT, U. S.

FILED
DEC 28 1973

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

NO. 73-500

RAYMOND L. NEWTON
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Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

WHETHER A SUBSTANTIAL FEDERAL QUESTION HAS BEEN DEMONSTRATED?

ARGUMENT

Petitioners allege that various rulings of the trial court in regard to their attempts to impeach three prosecution witnesses served to deprive the petitioners of a fair trial.

Their reliance upon this Court's recent decision in Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), is totally misplaced. In that case, Chambers' efforts to develop an exculpatory defense were frustrated by the cumulative impact of the trial court's several evidentiary rulings. Id., at fn 3. These adverse rulings occurred during Chambers' affirmative attempt to present his defense. He was not allowed to impeach an adverse witness because of the Mississippi "voucher" rule, and was not allowed to introduce testimony of three other witnesses on the ground of hearsay.

However, the rulings complained of in the instant case occurred during the presentation of the State's case, and were only with regard to certain limited questions sought to be asked on cross-examination and did not occur during the course of the

presentation of affirmative defenses by the petitioners. There was no such wholesale exclusion of testimony as occurred in Chambers.

The first ruling complained of was in regard to the trial court's refusal to allow an ex parte affidavit by the witness, Green, whose former testimony had been read to the jury, to be admitted into evidence to impeach his testimony. Relying upon Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), the court below affirmed the ruling of the trial court. (See Petition, App. 3-4.)

Mattox, supra, is still vital law, having been cited by this Court in numerous recent cases. See, e.g. Davis v. United States, 411 U.S. 233, 250, 93 S.Ct. 1577, 1587, 36 L.Ed.2d 216 (1973); Chambers v. Mississippi, supra, 410 U.S. at 295, 93 S.Ct. at 1046; Dutton v. Evans, 400 U.S. 74, 80, 91 S.Ct. 210, 215, 27 L.Ed.2d 213 (1973); California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 484 (1970).

Petitioners have attempted to distinguish the facts of the instant case from those of Mattox, supra. They point to the fact that the witness in Mattox was dead, while the witness in the case sub judice repudiated his own former testimony by ex parte affidavit prior to leaving the jurisdiction of the State. The court below noted this distinction and found that the facts in the instant case were even stronger in support of the reasons for the exclusion of such document. This was because the petitioners could have utilized Rule 3.190(L), Florida Rules of

Criminal Procedure (1971) to preserve the witness' testimony. Petitioners' counsel was aware that the witness was departing the State's jurisdiction, while the prosecution had no knowledge of such facts. (See Petition, App. 5)

The State rule relied upon by the court below provided, in part:

> (L) Motion to Take Deposition to Perpetuate Testimony.
>
> (1) At any time after the filing of an indictment, information, or affidavit upon which a defendant is to be tried, if he shall satisfy the court by his oath in writing, or by the affidavits of credible persons, that the testimony of an absent person is material and necessary to his defense, and that such witness resides beyond the territorial jurisdiction of the court or is so sick and infirm that with diligence his attendance cannot be procured at the trial, the court upon the proper application of the accused, or his attorney, shall order that a commission be issued to take the deposition of such witnesses to be used in the trial. If the application is made within ten days prior to the trial date the court may in the exercise of sound discretion deny such application.

(2) If a defendant desires to perpetuate the testimony of a witness living in or out of the state, whose testimony is material and necessary to his defense, the same proceedings shall be followed as set forth in sub-section (1) hereof; with the exception, however, that the testimony of such witness be taken before an official court reporter, transcribed by him, and filed in the trial court.

. . .

(4) Except as otherwise provided, the rules governing the taking and filing of oral depositions, the objections thereto, the issuing, execution and return of the commission, and the opening of the depositions in civil cases shall be observed in criminal cases.

(5) No deposition shall be used or read in evidence when the attendance of the witnesses can be procured, and if it shall appear to the court that any person whose deposition has been taken has absented himself by the procurement, inducement, or threats of the accused, or of any person on his behalf, such depositions shall not be read in evidence.

Parenthetically, it is noted that, at the time of petitioners' trial, such perpetuation of testimony was available only to defendants. The Rule has now been changed to allow the State to take depositions to perpetuate testimony as well. See Fla.R.Cr.P., Rule 3.190(j)(1973).

It is obvious that ruling of the court below could have been based solely upon the failure of the petitioners to follow State procedural rules. Therefore, this issue is not one properly within the jurisdiction of this Honorable Court. Where the state judgment rests on two grounds, one of which involves a federal question and one of which involves an adequate State ground, the latter of which would be sufficient to sustain the judgment, and it is not clear upon which of the two grounds the judgment was based, this Court should refuse to consider the question. Lynch v. New York, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191 (1934).

The second ruling complained of was the trial court's refusal to allow petitioners to ask two witnesses why their testimony at the second trial was less damaging than the testimony they had given at the first trial which had ended in mistrial. The court below found such contention of error to be "without merit." (See Petition, App. 6) However, the court ruled alternatively on this issue as well, finding that the trial court's ruling constituted harmless error, at most. (See Petition, App. 6-7)

The testimony sought to be impeached went to the question of first degree murder.

The court found that the jury disregarded such testimony in reaching the verdict of second degree murder. There were five eyewitnesses to the shooting incident. The error complained of here was with regard to rulings on attempted cross-examination of only two of them. It is obvious that the court below properly relied upon federal standards in determining the existence of harmless error. Harrington v. California, 395 U.S. 25, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Petitioners have failed to demonstrate, pursuant to Rule 19(1) of the Supreme Court Rules, that "special and important reasons" exist for this Court to assume jurisdiction to review the factual bases for the lower court's reliance upon previous decisions by this Honorable Court.

CONCLUSION

The existence of a federal question is debatable. Even if a federal question has been presented, it is unsubstantial. Therefore, this Court should deny jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Brief of Respondent in Opposition was served upon HENRY R. CARR, Esquire, 1440 N. W. 14th Avenue, Suite 2, Miami, Florida, 33125, this ___ day of December, 1973.

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